Daima Conections Company Limited & another v Ombui (Suing as the Legal Representative of the Estate of the Late David Ogega Ogioka) (Civil Appeal 100 of 2021) [2025] KEHC 3040 (KLR) (6 March 2025) (Judgment)

Neutral citation: [2025] KEHC 3040 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

CIVIL APPEAL 100 OF 2021

DKN MAGARE, J

MARCH 6, 2025

BETWEEN

DAIMA CONECTIONS COMPANY LIMITED ..... 1ST APPELLANT

JAMES KINARA ISOE ..... 2ND APPELLANT

AND

THOMAS OKIOGA OMBUI ..... RESPONDENT

SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE DAVID OGEGA OGIOKA

JUDGMENT

1. This is an appeal from the Judgment and decree of Hon. D.O. Mac'Andere (RM), dated 30.7.2021, arising from Kisii CMCC No. 622 of 2019. The Appellants were the defendants in the court below. The lower court heard the parties and proceeded to render the impugned judgment as follows:
    a. 50:50 liability
    b. Ksh. 10,000/- for pain and suffering
    c. Ksh. 1,120,000/- for loss of dependency
    d. Ksh. 100,000/- for loss of expectation of life
2. Aggrieved by the lower court's finding, the Appellant lodged the appeal herein vide a Memorandum of Appeal dated 24.8.2021, against liability and general damages. The Appellant posited that the lower court awarded general damages under pain and suffering, loss of expectation of life and loss of dependency that was inordinately high. The appeal also challenged the finding of 50:50 liability.

3. The Respondent filed suit vide a plaint dated 23.7.2019 claiming damages for an accident on 20.12.2017. It was stated that the deceased was riding motorcycle Registration No. KMDP 648H along Kisii-Keroka road. The Appellant were the owners of motor vehicle Registration No. KCK E028C. They allegedly hit motorcycle registration No. KMDP 648H violently fatally injuring the deceased.

4. The Respondents set forth particulars of negligence for the accident motor vehicle and pleaded special damages and general damages under the *Law Reform Act* and *Fatal Accidents Act*.

5. The Appellants entered appearance and filed a defence dated 23.9.2019 denying the particulars of negligence and injuries pleaded in the plaint.

Evidence

6. During the hearing, PW1 was Florence Nyamoita Okioga. The deceased was her son. He was 20 years old and not married. He was working at Kisii County Bunge Sacco, earning Ksh. 30,000/= per month. She produced the bundle of documents. On cross-examination, she had not filed evidence that the deceased was working.

7. PW2 was Benard Gisege. He was involved in the accident. He was going to Sotik and there was a motorcycle in front. There was a bus known as Daima that wanted to overtake. It was overtaking a canter. It came to the lane of the motorcycle and hit the motorcycle. On cross-examination, he testified that he witnessed only one accident. The motorcycle rider was bleeding and he died in hospital.

8. DW1 was No. 85663 PC Kennedy Walumbe of Kisii Police Station. According to him, the accident was booked as fatal accident. He produced the police abstract and OB dated 20.12.2017. The accident involved KCK 028C and KMDP 648H TVS. The driver was from Keroka's direction and was overtaking a lorry, which resulted in him swerving to the right, hence the accident. On cross-examination, he testified that he was not the investigating officer. He also did not have sketch maps. His evidence was that it was not indicated that the rider was to blame for the accident.

9. DW2 was Ochingo Okworo Josiah. He was the driver of KCK 028C. He testified that he was driving at 40 Km/h at around 0535hrs. In front of him, there was a car approaching, and a motorcycle was speeding and came to his lane. The motorcycle hit his motor vehicle while it was overtaking another motor vehicle. On cross-examination, he testified that he was driving in Kisii direction on his lane. He immediately held brakes to avert the danger. He was not overtaking.

Submissions

10. The Appellant submitted that it was not liable for the accident. Reliance was placed on the case of Eunice Wayuua Munyao v Mutilu Beatrice & 3 others (2017) eKLR to submit that the Respondent had not proved his case on the balance of probabilities.

11. On quantum, it was submitted that a minimum wage of Ksh. 6,896/= would have sufficed as a multiplicand. On loss of dependency, it was also submitted that a multiplier of 15 years would be appropriate.

12. The Respondent filed submissions dated 8.1.2025 that the lower court's finding on liability and quantum was proper. The Respondent submitted that Ksh. 10,000/= awarded under pain and suffering was nominal damages that could be awarded and need not be interfered with. Reliance was placed on Mercy Muriuki & Another v Samuel Mwangi Nduati & Another (2019) eKLR to submit that such award would range from Ksh 10,000-100,000).

13. It was also submitted that the award of loss of expectation of life was proper. On loss of dependency, it was submitted that the minimum age approach was the best as adopted by the learned magistrate.

Analysis

14. This being a first appeal, this court must re-evaluate and assess the evidence and make its conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanor of the witnesses and hearing their evidence firsthand.

15. This court does not have the advantage of seeing and hearing the witnesses as did the lower court, yet it must reconsider the evidence, evaluate it itself and draw its own conclusions. In Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123, this principle was enunciated thus:

> " ...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."

16. The Appellant urged the court to find that the lower court erred in finding the Appellant 50% liable. The court is asked to establish whether the lower court erred in finding, on a balance of probabilities, that the Appellant failed to prove his case. It follows that the initial burden of proof lies on the Plaintiffs, but the same may shift to the Defendant, depending on the circumstances of the case. In Evans Nyakwana –vs- Cleophas Bwana Ongaro [2015] eKLR it was held that:

> " As a general preposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107 (i) of the *Evidence Act*, Chapter 80 Laws of Kenya. Furthermore, the evidential burden... is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person...The appellant did not discharge that burden and as Section 108 of the *Evidence Act* provides the burden lies in that person who would fail if no evidence at all were given as either side."

17. What constitutes a burden of proof is set out in Sections 107-109 of the *Evidence Act* as follows:

> " 107.
>
> (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
>
> (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
>
> 108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

18. The question then is what amounts to proof on a balance of probabilities. Kimaru J in William Kabogo Gitau –vs- George Thuo & 2 Others [2010] 1 KLE 526 stated that:

> " In ordinary civil cases a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely that not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."

19. The balance of probabilities is also about what is likely to have happened than the other. Lord Nicholls of Birkenhead in Re H and Others (Minors) [1996] AC 563, 586 held that;

> " The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the even was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriated in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability....."

20. The standard of proof in civil cases must carry a reasonable degree of probability but not as high as required in a criminal case, for such a standard is based on a preponderance of probabilities. In Palace Investment Ltd –vs- Geoffrey Kariuki Mwenda & Another [2015] eKLR, the Judges of Appeal held that:

> " Denning J, in Miller –vs- Minister of Pensions [1947] 2 All ER 372 discussing the burden of proof had this to say;-
>
> "That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not.
>
> This, burden on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept where both parties...are equally (un) convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained."

21. The deceased herein was riding his motorcycle. The lower court discredited the evidence of PW2. There is no evidence to differ with the finding of the court in that respect. This was aptly stated in the case of Peters vs Sunday Post Limited [1958] EA 424 where, the court of appeal therein rendered itself as follows:-

> " It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion..."

22. His evidence did not point to what he saw as causation for the accident. He arrived at the scene after the accident, and his testimony was mainly about what he perceived after arrival. It is useful evidence in contextualizing the accident, but it is not eyewitness testimony.

23. DW1 produced the police abstract that was said to have been prepared after the investigation and blamed the deceased for the accident. However, the sketch map and investigation report were not produced in court. There were two abstracts, each on their own. The evidence of PW2 is, however, useful as circumstantial evidence. Though commonly used in the criminal realm, such evidence was stated to be good evidence if credible. For circumstantial evidence to work, it must be inconsistent with the accused's innocence. In the case of Ahamad Abolfathi Mohammed and Another v Republic [2018] eKLR, [P. KIHARA Kariuki, PCA, M'inoti & Murgor, JJ.A] the court had this to say on circumstantial evidence:

> " However, it is a truism that the guilt of an Accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an Accused person just as direct evidence. Way back in 1928 Lord Heward, CJ stated as follows on circumstantial evidence in R v Taylor, Weaver and Donovan [1928] Cr. App. R 21: -'It has been said that the evidence against the Applicant is circumstantial. So it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial."

24. The evidence of PW2 will give the status of the road as it was at the time he came to the scene, immediately. It will, however, not indicate how the accident occurred. The defense will also give a glimpse of what the Appellant's defense was not. In this case, overtaking was not one of the questions left for the court. To that extent, the evidence of DW1 is equally unserious as to how the accident occurred.

25. The evidence of DW1, recorded when the accident occurred, was that the deceased tried overtaking an oncoming vehicle, but the distance was short. This vehicle is neither named nor identified in any way. It was not involved in the accident. The defence evidence was not plausible. The legal burden of proof lies upon the party who invokes the aid of the law and asserts an issue based thereon. In Anne Wambui Ndiritu –vs- Joseph Kiprono Ropkoi & Another [2005] 1 EA 334, the Court of Appeal held that:

> " As a general proposition under Section 107 (1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act."

26. Further, the deceased died on the spot. This could not be the result of a slow-moving motorcycle. The Appellant was driving at a very high speed. It was the Appellant's duty to prove contributory negligence. This duty was laid out in the case of Mac Drugall App V Central Railroad Co. Rbr 63 Cal 431 where the court held that;

> " In an action to recover damages for a personal injury alleged to have been received through the negligence of the defendant, contributory negligence on the part of the plaintiff is a

matter of defence and it is an error to instruct the jury that the burden of proof is on the plaintiff to show that the injury occurred without such negligence".

27. In the circumstances, the evidence from the foregoing was that the Appellant was primarily to blame. However, there is no cross-appeal on liability. The consequence is that the appeal on liability is dismissed.

28. On damages for pain and suffering, the lower court awarded of Ksh. 10,000/- under this head. In Civil Appeal No. 42 of 2018 Joseph Kivati Wambua vs SMM & Another (suing as the Legal Representatives of the Estate of EMM-Deceased) paragraph *21* the Hon. Odunga J (as he then was) observed: -

> " The Appellant has taken issue with the award for pain and suffering on the ground that the evidence on record showed that the deceased passed away the same day and therefore the Respondents ought to have been awarded a lesser sum. In my view what determines the award under that head is how long the deceased took before he either passed away or lost consciousness... a distinction ought to be made between a case where the deceased passes away instantly and where the death takes place some times after the accident. In the former, the award ought to be minimal as the legal presumption is that the deceased did not undergo pain before he died. However, where the deceased dies several hours after the accident during which time he was conscious and was in pain, an award for pain and suffering would not be nominal."

29. The above case law points to the fact that the award of pain and suffering depends on whether the deceased died on the spot or after some time. That is, damages for pain and suffering are recoverable if the deceased suffered pain and suffering as a result of his injuries in the period before his death. Where a deceased died on the spot, courts have taken the approach that minimal damages should be granted, unlike in a case where a deceased died later on. In this case, the deceased passed away on the same day of the accident. There is no evidence that he was taken to any hospital before his death. However, as the Appellant did not show how Ksh.10,000/= would be excessive, I find no reason to disturb it. Further the Respondent did not file a cross-appeal thereon.

30. On loss of expectation of life, the Appellant submitted that Ksh. 50,000/= would be sufficient. Considering that the deceased was 20 years old and his life was cut short at a tender age, I do not find a sum of Ksh. 100,000/= being excessive. There was no evidence that the deceased was of ill health. In Mercy Muriuki & Another vs. Samuel Mwangi Nduati & Another (Suing as the legal Administrator of the Estate of the late Mwangi) [2019] eKLR it was observed that:

> " The generally accepted principle therefore is that very nominal damages will be awarded on these two heads of damages if the death followed immediately after the accident. The conventional award for loss of expectation of life is Kshs. 100,000/= while for pain and suffering the award range from Kshs. 10,000/= to Kshs. 100,000/= with higher damages being awarded if the pain and suffering was prolonged before death."

31. The other limb was the dependency ratio. The deceased herein was 20 years old and was not married. He had no child. There is no proof of income. In the circumstances, the global sum approach would have been the most appropriate. However, the lower court adopted the minimum wage approach. In Jane Chelagat Bor vs. Andrew Otieno Onduu [1988-92] 2 KAR 288; [1990-1994] EA 47, the Court of Appeal held that:

In effect, the court before it interferes with an award of damages, should be satisfied that the Judge acted on wrong principle of law, or has misapprehended the fact, or has for these or other reasons made

a wholly erroneous estimate of the damage suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the ground of excess or insufficiency.

32. The award of Ksh. 1,120,000/= was not inordinately high. I am unable to interfere with the discretion of the lower court. The Appellant did not demonstrate the basis for which the wage of Ksh. 14,000/= was unfounded. I am fortified by the reasoning of the court in the case of China Civil Engineering & another v Mwanyoha Kazungu Mweni & another [2019] eKLR as follows;

    On review of the evidence it may be just on the facts of this particular case to adopt the global sum assessment approach. Where the trial court considers that a particular case justice would be better served by applying a global sum approach instead of a multiplier to substantially dispose off the assessment of damages. There can be no misdirection for that procedure. To put simply one cannot even rule out that the deceased income generating activities entitled him to monthly income of Kshs.18,000 per month. Had the deceased continued for longer he was to provide for the dependents. I find no reason to take a different view of from the learned trial magistrate with regard to an assessment on loss of dependency under the *Fatal Accidents Act*.

33. I find no wrong principles that the lower court applied. In Jane Chelagat Bor vs. Andrew Otieno Onduu [1988-92] 2 KAR 288; [1990-1994] EA 47, the Court of Appeal held that:

> "In effect, the court before it interferes with an award of damages, should be satisfied that the Judge acted on wrong principle of law, or has misapprehended the fact, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the ground of excess or insufficiency.

34. There was no appeal against the award on special damages. I will not disturb this finding.

35. The issue of costs is governed by Section 27 of the *Civil Procedure Act*, which provides as follows:

    (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

    (2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.

36. The Court of Appeal in the case of Farah Awad Gullet v CMC Motors Group Limited [2018] KECA 158 (KLR) had this to say:

    It is our finding that the position in law if that costs are at the discretion of the court seized up of the matter with the usual caveat being that such discretion should be exercised judiciously meaning without caprice or whim and on sound reasoning secondly that a court can only withhold costs either partially or wholly from a successful party for good cause to be shown.

37. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012; [2014] eKLR, as follows: -

> "(18) It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.

38. The Court of Appeal in the case of Farah Awad Gullet v CMC Motors Group Limited [2018] KECA 158 (KLR) had this to say:

> " It is our finding that the position in law is that costs are at the discretion of the court seized up of the matter with the usual caveat being that such discretion should be exercised judiciously meaning without caprice or whim and on sound reasoning secondly that a court can only withhold costs either partially or wholly from a successful party for good cause to be shown.

39. In the circumstances, costs follow the event. The Respondents were successful, so they are entitled to costs in this court and the court below.

Determination

40. In the upshot, I make the following orders: -

    a. The appeal is dismissed.

    b. The Respondent shall have costs of Ksh. 125,000/=.

    c. 30 days stay of execution.

    d. 14 days right of appeal.

    e. The file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 6TH DAY OF MARCH, 2025.

Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of: -

Ms. Wanjira for Mr. Njuguna for the Appellant

Mr. Oremo for the Respondent

Court Assistant – Michael